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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ALAN WU et al., Plaintiffs and Appellants, v. ROGER LEE et al., Defendants and Respondents.	B227087 (Los Angeles County Super. Ct. No. BC405914)

APPEAL from the judgments of the Superior Court of Los Angeles County. Ramona G. See, Judge. Affirmed in part, reversed in part and remanded.

Law Offices of John Belcher and John A. Belcher for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Darin L. Wessel; Carlson Law Group, Anne Marie Watson and Mark C. Carlson for Defendants and Respondents Roger Lee and Leon Chien Corporation.

Manfredi, Levine, Eccles, Miller & Lanson, Mark F. Miller and David V. Hadek for Defendants and Respondents Hirsch Sherman and Boulevard Brokerage Group.

* * * * * * * * * *

This action arises from the sale of an apartment building. Plaintiffs and appellants Alan Wu, Shu Ping Wu, and K & J Trust (Sellers) were the owners of the building which they sold in 2004 to the Sobel Family Trust (Buyer). Sellers were represented in the transaction by defendants and respondents Roger Lee and the Leon Chien Corporation dba Re/Max 2000 Commercial (the Lee Defendants). Buyer was represented by defendants and respondents Hirsch Sherman and the Boulevard Brokerage Group, Inc. dba Re/Max on the Boulevard (the Sherman Defendants).

After the sale, Buyer sued Sellers for failing to disclose material defects in the roof of the building. Buyer's claims against Sellers were resolved through binding arbitration pursuant to an arbitration provision in the purchase and sale agreement, with the arbitrator ruling in favor of Buyer. Sellers paid the arbitration award to Buyer and then filed this action against the Lee Defendants and the Sherman Defendants. The trial court disposed of an indemnity claim on demurrer and granted summary judgment in favor of all defendants on the remaining claims for fraud and breach of contract. Sellers appeal, contending the trial court erred in sustaining the demurrer and in concluding no triable issues of material fact existed on any theory. We affirm the grant of summary judgment and the sustaining of the demurrer in favor of the Sherman Defendants. We reverse the summary judgment and the sustaining of the demurrer in favor of the Lee Defendants.

FACTUAL AND PROCEDURAL BACKGROUND

For purposes of our review, we accept Sellers' facts and defendants' undisputed facts as true. (*Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1125.)

Alan Wu is an experienced investor and owns multiple apartment buildings and commercial properties. Mr. Wu bought the apartment building located at 1750 North Serrano Avenue in Los Angeles (the property) in late 1997.[1] The 75-year old property

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[1] Alan Wu's wife (Shu Ping Wu) was on title to the property but did not personally participate in the purchase or sale transactions. During escrow with Buyer, the Wus deeded title to the property to their trust (K&J Trust) which transferred title to Buyer at the close of escrow.

consists of approximately 27 units and was built in the French Normandy architectural style, with a "steeply pitched slate roof." Sellers purchased the property from a bank as an investment, despite the fact there were "significant issues" with the condition of the property, including the roof. The sale documents prepared by the bank contained an "as is" provision, as well as a provision that the bank, as seller, would not be responsible for making any repairs.

Mr. Wu normally communicates in Mandarin Chinese, his native language, and he speaks only a moderate amount of English. Mr. Wu had a business relationship with Roger Lee dating back to 1995. Mr. Wu had engaged Mr. Lee to represent him in various real estate investment transactions, as he was able to conduct all of his business dealings with Mr. Lee in Chinese. In 2004, when Sellers decided to list the property for sale, Mr. Wu once again turned to Mr. Lee and entered into an oral contract with him to handle the transaction for Sellers. Their oral agency agreement was never reduced to writing. They agreed Mr. Lee would prepare all necessary paperwork for the transaction, work with the property's on-site building manager to review the books and records and conduct necessary inspections, and transmit all required disclosure information to prospective buyers, and Mr. Wu would not deal directly with any prospective buyer.

Sellers told Mr. Lee that the property should be marketed "as is" and that they wanted the same or substantially similar contractual language that the bank used when Sellers bought the property from the bank in 1997, including that the property was being sold "as is" and that any repairs, if warranted, would be the buyer's responsibility. Sellers believed that due to the age of the building and the unique style of the roof, a physical inspection of the property by prospective buyers was critical, and they would not agree to proceed with a sale without proof that the buyer agreed to remove the inspection contingency.

From conversations with Mr. Wu, Mr. Lee was aware the Building and Safety Department of the City of Los Angeles had issued several citations against the property related to the condition of the roof. He advised Sellers the property should not be

placed on the market until all of the repairs related to the citations were resolved. Sellers provided Mr. Lee with full access to the property and the on-site building manager to review all of the books and records, make necessary inspections or have them performed, and determine what issues and documents needed to be disclosed to prospective buyers. Sellers turned over the materials to Mr. Lee and entrusted him to, in turn, disclose the necessary documents to prospective buyers.

Mr. Lee copied various documents at the on-site business office and made several packets of documents to turn over to prospective buyers. The packets included documents such as the lease agreements with the building tenants, property tax records and the like. However, Mr. Lee did not review all of the documents in the office because there was "too much," and he did not include any maintenance records.

Buyer,[2] represented by the Sherman Defendants, was in the process of acquiring several parcels of real estate as investments. Mr. Lee told Mr. Sherman there was going to be an open house at the property for prospective buyers to walk through and inspect the property.

The open house was held July 27, 2004. Buyer attended with Mr. Sherman, as did at least a dozen other prospective buyers and their agents. Some prospective buyers were also accompanied by general contractors. Mr. Lee provided the packets of building records he had prepared to all attendees at the walk-through inspection, including Buyer. The attendees were escorted through the property by the building manager and Mr. Lee, and were given full access to see any portion of the property.

At one point during the walk-through, Buyer asked the building manager about the roof and was allowed to inspect the ceilings in all of the top floor units. Several water stains were pointed out on the ceilings of those upper units, as were some missing roof tiles visible from an upper unit window. Buyer and Mr. Sherman spent approximately two hours at the property. At the end of the open house, Buyer, along

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[2] Buyer's trustee was Sonia Sobel and the individual who was personally involved in purchasing the property on behalf of Buyer.

with Mr. Sherman, personally handed Mr. Lee the executed contingency removal document dated July 27, 2004.

Mr. Lee did not make any written disclosures about any roof issues, or otherwise document any of the disclosures he made to Buyer. Mr. Sherman denied making any representations to Buyer about the condition of the roof.

Buyer and Sellers opened escrow on the property with a purchase price of $5.3 million. Mr. Lee told Sellers he had presented sale documents to Buyer in the form requested by Mr. Wu, but that Buyer had rejected them and had returned an alternative form agreement, with various modifications added by Mr. Sherman. Mr. Lee represented that the modified sale documents still contained sufficient "as-is" protections for Sellers. Mr. Lee did not read the purchase and sale agreement or escrow instructions "in detail" and probably spent less than 30 minutes reviewing them. Mr. Lee's normal practice with Mr. Wu was to give him a "summary" of the "key points" of transactional documents, as opposed to translating every word into Chinese.

A counteroffer was provided to Buyer. Mr. Lee signed Mr. Wu's name on the counteroffer. Buyer executed another contingency removal document dated August 6, 2004, and executed the counter-offer on August 9, 2004, agreeing to purchase the property.

While escrow was pending, Mr. Lee represented to Sellers that he "double-checked" with the City of Los Angeles as to the existence of any open citations regarding the property and that there were no "open" or unresolved citations. Mr. Lee believed that Mr. Wu would "settle" or had settled any existing citations with the city; however, he also understood Mr. Wu was not talking directly with prospective buyers and that Mr. Wu believed Mr. Lee would handle the necessary disclosures. Mr. Lee did not disclose any information regarding the citations to Buyer because he believed they had all been resolved.

Mr. Lee represented to Sellers that all necessary disclosures had been made to Buyer and that all contingencies had been removed. Sellers relied on Mr. Lee's representations in agreeing to proceed with the close of escrow.

The sale of the property to Buyer was completed in October 2004. The Lee Defendants received a commission of $159,000, and the Sherman Defendants received a commission of $100,000, from the sale and transfer of the property.

In 2007, almost three years after the close of escrow, Buyer sued Sellers, contending Sellers failed to disclose material defects in the roof of the property, and that Buyer had been forced to replace the roof, suffering damages in excess of $400,000. Based on the arbitration provision in the purchase and sale agreement, Buyer's claims against Sellers were resolved through binding arbitration. The Lee Defendants and the Sherman Defendants were not parties to the agreement and did not participate in the arbitration.

The arbitrator ruled in favor of Buyer, finding the evidence established that Sellers had breached disclosure provisions in the purchase and sale agreement as to the condition of the roof, but finding insufficient evidence supported the fraud claim against Sellers. Buyer was awarded $422,568.33 on its breach of contract claim. Sellers paid the entire award.

Sellers then filed this action against the Lee Defendants and Sherman Defendants in January 2009. There were several rounds of demurrers to Sellers' pleading. After the filing of Sellers' second amended complaint, defendants once again demurred. The trial court sustained defendants' respective demurrers without leave to amend as to the cause of action for equitable indemnity, overruling the demurrers as to the remaining claims. Sellers filed a third amended complaint stating claims for fraud, fraudulent concealment, negligent misrepresentation, and breach of contract, and defendants answered.

Thereafter, the Lee Defendants and Sherman Defendants filed their respective motions for summary judgment. Sellers opposed the motions substantively, but also filed a motion for leave to file a proposed fourth amended complaint. On July 15, 2010, the trial court denied Sellers' motion for leave to amend and granted both summary judgment motions. Judgments were duly entered in favor of the Lee Defendants and Sherman Defendants. This appeal followed.

DISCUSSION

1. The Operative Pleading Is the Third Amended Complaint

The operative pleading frames the issues on summary judgment. "A defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99.) " 'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.' [Citations.]" (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.)

Both before this court and below, Sellers argue facts and theories contained in their *proposed* fourth amended complaint. However, the trial court denied Sellers' motion for leave to amend, explaining in part that Sellers failed to show how any of the proposed new facts were newly discovered and offered no explanation for why they were not included in any of the previous versions of Sellers' pleading, given that the new facts were discovered no later than the date of the underlying arbitration.

Sellers failed to present any argument or legal authority in their opening brief on appeal contending the trial court abused its discretion in denying them leave to file their proposed fourth amended complaint. Sellers argue only in their reply brief that the issue of denial of leave is appealable from a final judgment. The issue is *not* one of appealability—the order denying leave to amend was appealable. The issue is Sellers' obligation, as appellants, to raise the argument in their opening brief on appeal and affirmatively show error by citation to the record, supported by relevant legal authority. Sellers failed to do so and the issue has therefore been waived. (See *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365, 368, fn. 1; *Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1671.)

Accordingly, the facts summarized above reflect only the claims embraced by the operative third amended complaint and the facts and reasonable inferences arising from the evidence related to those claims—the only facts germane to our decision. We now

turn to a discussion of whether any triable issues of fact exist as to any of the causes of action stated in the third amended complaint as to any of the defendants.

2. The Doctrine of Res Judicata Does Not Apply

Defendants successfully raised the doctrine of res judicata in arguing their respective motions to the trial court, relying on the arbitration between Buyer and Sellers and the resulting award in Buyer's favor. However, when the underlying judgment is an arbitration award, a third party to the arbitration may not assert the binding effect of the award as a shield in a subsequent proceeding unless the parties to the arbitration agreement expressly so provided.

As explained by the Supreme Court: "[T]he policies underlying the doctrine of collateral estoppel must yield to the contractual basis of private arbitration, i.e., the principle that the scope and effect of the arbitration are for the parties themselves to decide. Accordingly, we are compelled to conclude that a private arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the arbitral parties agreed, in the particular case, that such a consequence should apply." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 833-834.) There is no evidence that Buyer and Sellers' arbitration agreement contained any provision that the final arbitration award would preclude relitigation of issues in any subsequent action involving third parties such, as the Sherman Defendants or Lee Defendants. We conclude the doctrine of res judicata does not apply to bar any claim against any defendant.[3]

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[3] We find unpersuasive defendants' arguments the exceptions to *Vandenberg* apply here. (See, e.g., *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 557-558; *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 576-579.) The record does not support a finding that the potential liability of the Lee Defendants or Sherman Defendants is merely derivative of an arbitral party.

3. Summary Judgment Was Properly Granted in Favor of the Sherman Defendants

a. Standard of review

"The standard of review of an order granting summary judgment is well established. Our review is de novo. [Citation.] We independently review the entire record, except as to evidence to which objections were timely made and sustained, in the same manner as the trial court. [Citation.] First, we review the issues framed by the operative pleadings to determine the scope of material issues. We then determine if the moving party has discharged its initial movant's burden of production. If we determine the moving party made the requisite prima facie showing of the nonexistence of a triable issue of fact, we then review the opposing party's submissions to determine if a material triable issue exists. [Citations.] 'In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing [defendant's] own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.' [Citations.] 'The trial judge's stated reason for granting summary judgment is not binding on us because we review its ruling, not its rationale.' [Citation.]" (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1008-1009.)

a. There is no triable issue as to fraud by the Sherman defendants

Sellers pled only two causes of action against the Sherman Defendants: the first cause of action for fraud and the fourth cause of action for fraudulent concealment. The claims are largely duplicative, one couching defendants' acts as affirmative misrepresentations, the other as the concealment of material facts. Both claims fail for lack of evidence as to the essential elements of fraud. (5 Witkin, Summary of Cal. Law (10th ed. 2005) § 772, p. 1121 [the elements of fraud are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage"].)

Distilled to their essence, Sellers' claims are based on two theories of alleged fraud by the Sherman Defendants. First, Sellers contend that Mr. Sherman forged Buyer's signature on the contingency removal documents presented to Sellers during escrow. Second, Sellers contend that Mr. Sherman made various misrepresentations to Buyer about the condition of the roof and the lack of any need to formally inspect the property.

In moving for summary judgment, the Sherman Defendants offered evidence the contingency removal documents executed by Buyer and presented to Sellers were not forged. Mr. Sherman testified he never "directed" Buyer to execute the removal documents. He said when Buyer asked what she should do, he explained to her that she should satisfy herself with an inspection and then if she wanted the property, she would need to execute the document. Mr. Sherman also explained that, as to the July 27, 2004 contingency removal document, he wrote in the contingency removal language but that Buyer (Ms. Sobel) executed the document. Mr. Sherman was adamant he did not execute the contingency removal documents for Buyer.

In opposition, Sellers failed to present competent evidence raising a material triable issue the contingency removal documents were forgeries. Sellers relied primarily on an ambiguous judicial admission from Buyer in the underlying pleading against Sellers that Mr. Sherman had "directed" her to execute the removal documents, as well as on testimony by Mr. Sherman that Ms. Sobel would sometimes ask him to sign documents for her, in her presence, because she had arthritis. The testimony was in response to a general question and not in reference to the execution of any specific document. We conclude Sellers' evidence is insufficient to raise a material triable issue of actionable fraud based on a purported forgery.

As for Sellers' theory Mr. Sherman made factual misrepresentations to Buyer concerning the roof condition or the need for a physical inspection of the property, Sellers fail to offer evidence or legal argument establishing a valid basis for finding justifiable reliance by *Sellers* on these alleged misrepresentations made by Mr. Sherman *exclusively to Buyer*, his principal. Sellers claimed they did not know of the alleged

misrepresentations by Mr. Sherman to Buyer until the arbitration some four years after the property transfer. And, Mr. Wu stated that he relied on *Mr. Lee's representations to him* that all disclosures had been made and all contingencies removed in making his decision to proceed with the closing of escrow. Mr. Wu testified he did not even see the written contingency removal documents because Mr. Lee never showed them to him. Sellers' own evidence defeats any finding of justifiable or detrimental reliance on misrepresentations by Buyer's broker in consummating the transaction with Buyer.

At oral argument, counsel for Sellers contended there was a triable issue of fact as to the liability of the Sherman Defendants for constructive fraud based on Sellers' theory that Mr. Sherman was a fiduciary of Sellers. Counsel argued that allegations of an agency relationship between the Sherman Defendants and Sellers were pled in each version of Sellers' complaint, and that it was not a new theory first set forth in the proposed fourth amended complaint. We find this argument to be completely without merit. The original, first amended, second amended and third amended complaints all contain judicial admissions by Sellers that the Lee Defendants represented Sellers in the transaction, and the Sherman Defendants represented Buyer. There are no allegations that can be construed as raising an inference otherwise, nor any allegations supporting any joint agency relationships.

The fact Sellers initially pled a professional negligence theory against all brokers does not aid Sellers' argument. The negligence theory was pled in the most general terms and without any facts stating a basis for an agency relationship between Sellers and the Sherman Defendants that would support a professional duty owed as a fiduciary by Mr. Sherman to the Sellers. The multiple specific allegations that Mr. Sherman represented Buyer and Mr. Lee represented Sellers supersede any generalized professional duty allegations. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 450, p. 584 [specific allegations control over general].) And, the only evidence relied upon by Sellers in support of this theory is the original offer, with the erroneous agent designation, later corrected in the counteroffer and in the final contract, which accurately stated the agency relationships that all parties had acted upon and ratified

throughout the transaction. There is no material dispute that Mr. Sherman was an agent for Sellers.

The record thus reveals no triable issue of actionable fraud by Mr. Sherman. A defendant is entitled to judgment as a matter of law where an essential element of the plaintiff's cause of action cannot be established. (See Code Civ. Proc., § 437c, subds. (o), (p)(2); *Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 164.) Summary adjudication of the two fraud causes of action against the Sherman Defendants was proper.

4. The Entry of Judgment in Favor of the Lee Defendants Must Be Reversed

There are triable issues of material fact as to the potential liability of the Lee Defendants to Sellers, and therefore we reverse the grant of summary judgment in favor of the Lee Defendants. We are governed by the same standard of review set forth in part 3a above.

a. The breach of contract claim

The Lee Defendants contend the statute of frauds bars enforcement of the oral agency agreement with Sellers because it is an agreement to earn a commission for the sale of real property which must be in writing. (Civ. Code, § 1624, subd. (a)(4).) The argument is without merit.

The main purpose of the statute of frauds is evidentiary. "It requires reliable evidence of the existence and terms of the contract so as to prevent enforcement through fraud or perjury of a contract that was never in fact made." (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1556; see also *Sterling v. Taylor* (2007) 40 Cal.4th 757, 766-767.) The statute of frauds does not apply to an executed oral contract. (*Lee v. Lee*, at p. 1557; accord, 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 401, pp. 440-441 [statute of frauds "cannot be used to attack an oral contract that has been fully performed"].) Moreover, "[a]n oral agreement (otherwise within the statute of frauds) will be held enforceable if the plaintiff, in justified reliance upon it, has so changed position that unconscionable injury would result, *or the defendant, having accepted the benefit of the contract, would be unjustly enriched by its nonenforcement*." (*Dallman Co. v. Southern Heater Co*. (1968) 262 Cal.App.2d 582, 588-589, italics added.)

The record established the oral agency agreement between Sellers and the Lee Defendants was fully executed. Sellers performed their obligations under the oral agreement and paid Mr. Lee a commission in the amount of $159,000 for services rendered in the sale transaction. Mr. Lee accepted and retained that substantial benefit. The primary purpose of Civil Code section 1624, subdivision (a)(4) is "to protect real estate sellers and purchasers from the assertion of false claims by brokers for commissions." (*Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1257.) It is not meant to cloak an agent with immunity from responsibility for alleged breaches of duties owed to his principal. (See *Steiner v. Rowley* (1950) 35 Cal.2d 713, 717 [statute of frauds did not bar principal's oral contract claim against agent for recovery of secret profit where agent had been paid commission and contract was fully executed].)

On the merits of the claim, the Lee Defendants contend that the purchase and sale documents negate any claim by Sellers that Mr. Lee undertook any contractual duties regarding disclosures to Buyer, citing *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745. Defendants' reliance on *Carleton* is unavailing. In *Carleton*, there was no claim of an oral agency agreement. The parties conceded the terms of the agency were set forth in the written listing agreement and purchase and sale documents. (*Id*. at p. 755.) Those documents expressly provided that the agent was qualified to render advice only on real estate matters, and that if legal or tax advice was desired, a competent professional in those fields should be consulted. (*Id*. at pp. 755-756.) The reviewing court therefore correctly concluded that the writings negated the principal's claim that the agent had undertaken a contractual duty to provide tax advice on the consequences of the property transfer. (*Id*. at p. 756.)

Here, Sellers alleged that Mr. Lee entered into an oral agency agreement by which he assumed a duty to them to inspect the property and make the necessary disclosures to prospective buyers. Mr. Wu testified he made Mr. Lee aware of the roof issues, the history of leaks, and the multiple citations from the city, and that he made the building records and the on-site manager available to Mr. Lee so he could determine what information and documents had to be disclosed to prospective buyers. The

evidence and reasonable inferences therefrom show that Mr. Wu relied on Mr. Lee (given Mr. Wu's language difficulties) to compile the information he provided and make it available to prospective buyers. The "buyer's inspection advisory" in the form real estate contract between Sellers and Buyer does not negate the separate oral agreement between Sellers and Mr. Lee. Triable issues remain as to the formation and scope of the oral agreement and the Lee Defendants' discharge of any duties owed pursuant to that agreement.

b. The negligent misrepresentation claim

Sellers stated a claim titled "negligent misrepresentation" against the Lee Defendants. The cause of action is based on allegations that Mr. Lee, as Sellers' agent, represented that he made all requisite disclosures to Buyer, and that all contingencies had been removed, and that Sellers relied on those misrepresentations to their detriment in proceeding with the sale of the property. No matter the title of the cause of action, the evidence in the record shows a triable issue as to potential breaches of fiduciary duty by Mr. Lee that may amount to negligent misrepresentation, constructive fraud or breach of fiduciary duty. Summary adjudication was therefore improper.

It is undisputed Mr. Lee was Sellers' agent in the subject transaction. He therefore was a fiduciary of Sellers and obligated to discharge his duties accordingly. "The fiduciary duties of a real estate agent include the duties to obey the instructions of the client, and to provide diligent and faithful service. (2 Miller & Starr, Cal. Real Estate (3d ed. 2000) Agency, § 3:25, p. 119.)" (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607.) Moreover, " '[i]t is well settled in this state that the law imposes on a real estate broker the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary [citation].' [Citation.] . . . '[The] relationship not only imposes upon [the broker] the duty of acting in the highest good faith toward his principal but precludes the agent from obtaining any advantage over the principal and any transaction had by virtue of his agency. [Citation.] "*Such an agent is charged with a duty of fullest disclosure of all material facts concerning the transaction*

that might affect the principal's decision. [Citations.]" ' [Citations.]" (*Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 178, italics added.)

" 'In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for *constructive fraud* even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another *even though the conduct is not otherwise fraudulent*. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent*.' [Citation.]" (*Salahutdin v. Valley of California, Inc*. (1994) 24 Cal.App.4th 555, 562.)

Mr. Wu testified that he gave Mr. Lee unfettered access to the property and the building records, that Mr. Lee represented he had made all necessary disclosures to Buyer, and that Mr. Wu relied on Mr. Lee in explaining and handling the English paperwork throughout the transaction. Mr. Lee testified he knew Sellers were likely relying on him to communicate disclosures to Buyer, that he did not disclose any information about any of the city citations to Buyer, that he did not review all of the building records that Mr. Wu provided to him because there was "too much," that he did not bother to read the purchase and sale agreement and the escrow instructions in detail, and that he did not translate all of the documents into Chinese for Mr. Wu's review, among other acts. The evidence showed, at a minimum, triable issues as to whether or not Mr. Lee made "careless misstatements" to Sellers as to issues material to their decision to proceed with the sale. It was error to summarily adjudicate this cause of action.

c. The fraud causes of action

The causes of action for fraud and fraudulent concealment are based on the same core allegations as the negligent misrepresentation claim, except that it is as alleged Mr. Lee knowingly made misrepresentations to Sellers and intentionally concealed facts from Sellers to induce them to proceed with the sale. There are triable issues of fact as to both fraud claims for the same reasons explained above as to the negligent misrepresentation theory.

5. The Equitable Indemnity Claim

The equitable indemnity cause of action in Sellers' second amended complaint was disposed of by way of demurrer. Sellers did not expressly claim error on appeal with the trial court's ruling on demurrer, or state the standard of review for an order sustaining a demurrer without leave to amend. Nevertheless, Sellers adequately raised substantive arguments in support of their contention the equitable indemnity claim is viable, and defendants briefed the issue as well. There appears to be no prejudice in resolving the claim on its merits and therefore we will consider it. (Code Civ. Proc., § 906; *Jennings v. Marralle* (1994) 8 Cal.4th 121, 128; *Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 Cal.App.3d 343, 347.) We conclude the demurrer ruling must be reversed as to the Lee Defendants.

Equitable indemnity requires the existence of a joint legal obligation owed by multiple actors to an injured party. (*Prince v. Pacific Gas & Electric Co*. (2009) 45 Cal.4th 1151, 1160-1161; accord, *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 573.) The multiple tortfeasors need not be joined in a single action, and their respective acts of liability may be concurrent or successive, joint or several, so long as they combine to " 'legally create a detriment compensable against multiple actors.' " (*GEM Developers v. Hallcraft Homes of San Diego, Inc*. (1989) 213 Cal.App.3d 419, 431; accord, *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 852.)

The relationship between the parties causing the harm is not determinative. "What is important is the relationship of the tortfeasors to the [injured party] and the

interrelated nature of the harm done.' [Citation.]" (*Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal. App. 4th 1109, 1115 [sellers' agent allowed to seek equitable indemnity from home inspection company for damages suffered by buyer for failure to disclose defects in real property].) "Nor must joint tortfeasors owe the same duty of care to the [injured party]. '[A] defendant/indemnitee may in an action for indemnity seek apportionment of the loss on any theory that was available to the [injured party] upon which the [injured party] would have been successful.' [Citations.]" (*Ibid*.)

Sellers alleged the broker defendants breached the same or similar duties that Sellers owed to Buyer with respect to disclosure of known defects in the condition of the property, causing the same loss in value of the building. The demurrer need not be reversed as to the Sherman Defendants because they established there is no material dispute that Mr. Lee made no disclosures about any roof issues to Buyer or the Sherman Defendants, and Mr. Sherman made no representations to Buyer about the condition of the roof. Since the claim for equitable indemnity rests on the same facts as Sellers' other claims against the Sherman Defendants, there was no prejudicial error in the sustaining of the demurrer as to the Sherman Defendants. But, there are material disputes as to the Lee Defendants' liability on Sellers' causes of action for fraud, negligent misrepresentation and breach of contract, which are based on the same facts as those which give rise to the claim for equitable indemnity. Thus, the ruling on demurrer must be reversed as to the Lee Defendants.

DISPOSITION

The ruling on demurrer and the summary adjudication of the causes of action for fraud and fraudulent concealment entered in favor of Hirsch Sherman and Boulevard Brokerage Group, Inc. dba Re/Max on the Boulevard are affirmed.

The ruling on demurrer and the summary judgment entered in favor of Roger Lee and Leon Chien Corporation dba Re/Max 2000 Commercial are reversed, and the action is remanded for further proceedings.

Hirsch Sherman and Boulevard Brokerage Group, Inc. dba Re/Max on the Boulevard shall recover their costs on appeal from Sellers. Sellers shall recover their costs on appeal from Roger Lee and Leon Chien Corporation dba Re/Max 2000 Commercial that were incurred in relation to the rulings in favor of the Lee Defendants.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, ACTING P. J.

FLIER, J.